Supreme Court, U.S.
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JUL 1 1991
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NO. 90-1871

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1990

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ODESSA AYOUB, INDEPENDENT EXECUTRIX
OF THE ESTATE OF ABDEL K. AYOUB
Petitioners

V.

TEXAS A & M UNIVERSITY, et al.
Respondents

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in ruling that Petitioner's speech was not protected by the First Amendment.

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Respondents hereby file their brief in opposition to Petitioner's Writ of Certiorari to review of the United States Court of Appeals for the Fifth Circuit in this case.

STATEMENT OF FACTS

Dr. A.K. Ayoub was hired by Texas A&M University as a professor of electrical engineering in 1968. Among the faculty hired that year, the highest initial salary was paid to a foreign-born professor. *Ayoub v. Texas A&M University*, 927 F.2d 834 (5th Cir. 1991). Thirteen years later, in 1981, Petitioner filed a salary grievance with the University, complaining of his low starting salary in 1968 which he felt continued to disadvantage him. *Ayoub*, at 835. Thereafter, Petitioner complained on numerous occasions about the perceived salary disparity. Subsequently, his contention was that he had been hired at an inappropriately low salary in

1968 because of his foreign national origin. (Record Excerpt 94; (R.E. 94) Tr. 3-70.)

His complaints and behavior became disruptive over the years, although his salary received several comprehensive reviews. In response to complaints about his attitude and disruptions, he was reassigned to a larger office, with more windows, in another building. When Petitioner requested that the move be postponed until after finals and raised possible "unnecessary risks . . . concerning [his] health," the move was postponed. *Ayoub*, at 835. A faculty committee reviewed the move not as to "whether they were right in moving him but whether they followed the right steps" in doing so. (R.E. 11; Tr. 1-61.) The committee concluded the Petitioner had been denied due process because he had not received prior notice of the move. *Ayoub*, at 835-36. This finding was not based on any formal written rules and regulations. (R.E. 11; Tr. 1-61.) The Court of Appeals noted that Petitioner did not contend on appeal that he suffered actual discrimination in terms of pay, except at his 1968 hiring and that the conduct in question rested solely on the decision to move him. *Ayoub*, at 836 n.1. The court added that the record reflected that Petitioner was reinstated to his old office before he physically moved to the new one. *Id.*

Petitioner filed a charge with the Equal Employment Opportunity Commission (EEOC). At that time, the highest paid professor in the Electrical Engineering Department was foreign-born. (R.E. 126-140, 43-44, D. Exh. 16; Tr. 2-61-62.) Subsequently, he received a "Right to Sue" letter. *Ayoub*, at 836. Petitioner claimed the University moved his office in retaliation for speaking out about an alleged salary disparity based on national origin. *Ayoub*, at 836.

The trial court dismissed all of Petitioner's claims, including his Title VII claim, and allowed the First Amendment claim to go to the jury. *Ayoub*, at 836. The jury awarded $625,000.00 in compensatory and punitive damages.

Ayoub, at 836. U.S. District Judge Norman Black entered a judgment notwithstanding the verdict holding that Petitioner's speech was not protected, the Defendants' were shielded by qualified immunity and the evidence did not support the verdict. *Ayoub*, at 836.

On appeal, the Fifth Circuit affirmed the district court and found that Petitioner's "speech included only his personal situation and hence was not protected as a matter of public concern." *Ayoub*, at 836.

ARGUMENT

The Fifth Circuit below fully considered and correctly decided to affirm the District Court's ruling for several reasons. First, the Petitioner spoke only on a matter of personal interest, not public concern and therefore his speech was not protected by the First Amendment. Second, even if his speech contained a matter of public concern, the efficient administration of the academic department outweighed his free speech interest. In reaching its decision that Petitioner did not speak out on a matter of public concern, the Fifth Circuit followed a long line of unbroken authority. To grant a writ of certiorari on this matter would entail questioning the well-established First Amendment law created by this Court. In addition, a review of the "interest of efficient administration" would be fact intensive.

Petitioner argues that this case presents important questions concerning the First Amendment rights of a public employee:

> 1. Whether an employee who complains or questions the existence of a discriminatory system which personally affects the employee addresses a matter of public concern.

2. Whether the employee must protest the effect of the discrimination upon others.
3. Whether such protest must be made public.

Respondents contend that those questions have already been addressed by this Court many times. A more accurate interpretation of the facts in this case would leave one readily answerable issue: whether a professor who complains privately about his salary is protected by the First Amendment.

This court has clearly delineated the type of speech which is protected by the First Amendment. The First Amendment protects speech on a "matter of public concern," that is, speech which addresses a topic about which "debate is vital to informed decision-making by the electorate." *Pickering v. Board of Education*, 391 U.S. 563, 568, 571-72 (1968). By contrast, "when a public employee speaks not as citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). (Emphasis added.) Whether Petitioners speech was a matter of "public concern", and therefore protected is a question of law for the Court. *Connick*, at 147-48; *Pickering*, at 568; *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1361-62 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 948 (1987). To make this determination, the Court must examine the content, form, and context of the speech as revealed by the record as a whole. *Connick*, at 147-48. The Petitioner bears the burden of proof on this issue. *Rankin v. McPherson*, 483 U.S. 378 (1987); *Pickering*, at 568.

The Petitioner has failed to meet this burden. The content of Petitioner's speech related only to his personal interest and his salary. Petitioner does not allege that he spoke out concerning a two-tier payment system as it related to others. This would have been difficult to allege as no evidence was presented that such a "two-tier" system ever existed. The evidence showed that not a word of protest against this "two-tier system" was even uttered before the alleged retaliatory acts by the Respondents. *Ayoub*, at 837. Only when Petitioner's attorney filed his EEOC charge did the "two-tier system" concept and complaint appear. *Ayoub*, at 837. The Fifth Circuit found only a scintilla of evidence that Petitioner ever spoke about any pay disparity against foreign born professors, Petition for Writ of Certiorari, Fifth Circuit Order at B-3.

Instead the Fifth Circuit found only that Petitioner speech "involved only his personal situation and hence was not protected as a matter of public concern." *Ayoub*, at 836.

In his Writ for Certiorari, Petitioner quotes testimony concerning a conversation with Dr. Phillips to prove that Petitioner questioned this two-tier system which allegedly discriminated against foreign-born professors. A full disclosure of the record reflects that this conversation focused exclusively on the Petitioner's salary. Dr. Phillips explained that Petitioner's "complaint was about his own salary, not about [other's] . . . " (R.E. 100; Tr. 3-177.) On the next page, Phillips reiterated this point:

> Well, his real complaint was about his own salary. We never talked about anybody else's.

(R.E. 101; Tr. 3-178.)

No evidence indicates that Petitioner ever took up the cause of any other foreign-born professor or ever complained of another professor's salary but his own. As Petitioner

himself declared in a note to Defendants Richardson and Fletcher, "The issue is my own livelihood." (R.E. 119-120; P. Exh. 69.)

Even had the Petitioner a legitimate complaint about his salary, the Fifth Circuit correctly stated "if Ayoub had a lower pay, the problem arose when he was hired some twenty years before suit was filed," Petition for Writ of Certiorari, Fifth Circuit Order at B-3. Petitioner's exclusive focus on his own personal situation, with no reference to the plight of others in the relevant class (foreign-born faculty), is significant. Compare *Thomas v. Harris County*, 784 F.2d 648, 653 (5th Cir. 1986), in which the complaint "that a particular segment of the community is singled out for special treatment" by the police is distinguished from "remarks [that are] merely 'criticism directed at public officials' [which] constitute nothing more than complaints over internal police department affairs." Petitioner's speech more obviously fits the latter characterization than the former.

The form of his speech was "casual" and virtually indistinguishable from that of the typical faculty gripe about low pay "at any given time, in any given institution, in any given place." The context of Petitioner's speech further reinforces its purely personal nature. It is undisputed from the record that Petitioner communicated his complaints only internally, primarily within his department, and only to individuals who might have some control or influence with respect to his salary. No evidence indicates (and Petitioner does not claim) that at any relevant time Petitioner made his protest known even to other foreign-born victims of the alleged "two-tier system," much less to the faculty, the university community, or the public at large. See, *Ayoub*, at 837. As the Fifth Circuit correctly stated, the context in which Ayoub's speech was presented "was a purely personal and private matter." *Ayoub*, at 838. While rejecting the holding "that a public employee forfeits his protection against

governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly," the Supreme Court went on to note that the interests of the employee "'in commenting on matters of public concern' must be balanced against the 'interest of the state as an employer in promoting the efficiency of the public services it performs through its employees.'" *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 (1979), quoting *Pickering*, at 568. "Private expression, however, may in some situations bring additional factors to the *Pickering* calculus." *Id.*, at 415 n. 4. When the speech is uttered publicly, content may outweigh context in the determination of whether the speech is protected; but with private expression the reverse may be the case. *Id.* When an employee confronts his immediate supervisor, the agency's institutional efficiency may be threatened not only by the content, but also by the "manner, time, and place in which it is delivered." *Id.*

Petitioner seeks to distinguish this case by citing several cases. A close scrutiny of these cases demonstrates that they are in agreement with *Connick* and its progeny. Petitioner cites *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) for the proposition that workers may individually or collectively voice their views to their employees. *Babbitt*, at 313. This quote is accurate, however, the next sentence concludes the thought: "the Constitution does not afford such employees the right to compel employers to engage in a dialogue or even to listen." *Id.* This case is easily distinguishable from the instant case as it was brought by a union, not an individual. In *Babbitt* the United States Supreme Court decided that the question was not one of First Amendment, but rather of rights conferred by statute, *Id.*, at 313. Petitioner himself distinguishes *Rankin v. McPherson*, 483 U.S. 378 (1987); *Pickering*, at 568. As Petitioner states, the Court did not consider whether McPherson had a personal interest in the program cut back by the Reagan

administration. Petition for Writ of Certiorari, at 13. Rankin was discharged because in the context of a conversation about President Reagan's policies in which she said "shoot, if they go for him again, I hope they get him [referring to an attempted assassination]." *Rankin*, at 381-82. Clearly a conversation about Presidential policies and the life of the President are matters of public concern and cannot be compared to Petitioner's complaints about his salary.

An individual does have rights, but these must be tied to a matter of public concern. *Brawner v. City of Richardson, Texas*, 855 F.2d 187, 192 (5th Cir. 1988), concerns the discharge of an individual for sending a letter about misconduct of public officials to the police chief, mayor, city council members and newspaper reporters. Again unlike *Ayoub*, this case involved a matter of public concern which was published to the public. Petitioner cites *Givhan*, at 439 for the proposition that the matter of public concern need not be aired publicly. In *Givhan*, a teacher was dismissed for criticism to her superior of the school district's policies which she believed to be racially discriminatory. *Id.* , at 412-13. As previously noted in this brief, private expression may bring additional factors to the *Pickering* calculus, *Id.*, at 415 n. 4. When an immediate superior is confronted, the institutional efficiency may be threatened by the content of the message, and the manner, time and place in which it is delivered. *Id.*

Petitioner does not deny that his complaints created a disruptive atmosphere. In this regard, Petitioner's own evidence is illuminating. According to Plaintiff's witness Dr. Painter, Ayoub "was volatile, had a volatile personality." (R.E. 90; Tr. 3-54.) Another of Petitioner's witnesses, Dr. Kozik, testified:

> The next issue as to find out what the reasons were [for moving Dr. Ayoub's office]; and Dr. Ayoub claimed it was because he was

> criticizing the administration; but when I talked to some of his colleagues, I got different answers, depending on who I talked with. Some felt that he was obstreperous. Others had felt that he was causing disruption among the staff, in particular; whereas, others felt that was not the issue.

(R.E. 9; Tr. 1-59.)

Assuming arguendo that speech is determined to be protected (or to contain some element of public concern), the Court still must balance, as a question of law, the interest of the employee as a citizen against the interest of the public agency in promoting efficiency and harmony in the work place. *Connick*, at 147-48. To strike this balance, the Court must consider whether, *inter alia*, "the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, at 388, citing *Pickering*, at 570-73. The question to be decided, is whether the academic administrators' interest in department harmony outweighs Petitioner's interest in uttering the speech in question. Once the administrators' interest is held to prevail, the inquiry ends for the federal courts. It is not within the province of the court or jury to second-guess the administrators' discretionary judgment as to the nature and extent of the disruption, or the measures needed to restore, maintain, or promote harmony and efficiency. *Cf. Megill v. Board of Regents*, 541 F.2d 1073, 1077 (5th Cir. 1976) ("federal courts should be loathe to intrude into internal school affairs"), relying upon *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) ("the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions"). Thus

the issues for the court are: 1) does the administrators' interest outweigh Petitioner in the relevant context, and 2) does any rational basis exist to support the administrators' assessment of Petitioner's disruptiveness?

Weighing on Petitioner's end of the scales is the minimal public interest element of his speech, as shown above. Tipping the balance is the inherently disharmonious nature of his speech, as shown even by his evidence. For a period of years, Petitioner complained incessantly to his superiors, including each new supervisor, (R.E. 88; Tr. 3-42), about his allegedly low salary. There is no doubt from the record that a number of Petitioner's colleagues did find his behavior and manner objectionable, including his constant complaining.

Clearly then, the administrators of the University's Electrical Engineering Department had some rational basis for concluding that Petitioner was disruptive and that some action needed to be taken. The decision to strike the balance in favor of Defendants' interest in departmental efficiency was amply supported. In a case directly on point, the Eleventh Circuit affirmed judgment n.o.v. in favor of state university officials who transferred five mechanical engineering professors to other departments and moved their offices after the latter sent a "self study" critical of their department to an accrediting agency. *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988). If anything, the speech at issue in *Maples* was more a matter of public concern than Petitioner's, discussing systemic matters ("the critical need for new faulty, additional funding and more physical space, . . . the lack of faulty involvement in administrative decision-making . . . .") as opposed to the individual salary concerns of one professor. *Id.*, at 1549, 1553. Nevertheless, the court held that the administrative interest preponderated. While differences may be noted between the *Maples* speech and Petitioner's, as the determination is made case-by-case, some features of the former are useful for the

present analysis. The offending faculty comments "occur[red] in the context of a longstanding dispute," they "contributed to a lack of harmony among the faculty and interfered with the regular operation of the M.E. Department," and they "severely hampered communication between members of the faculty and the department head." *Id.*, at 1554. There simply can be no doubt that disharmony and hampered communication between other members of the faculty as well, if not all.

As demonstrated, although the question of whether speech is matter of public concern is one of law, the initial determination is also fact intensive. As in *Maples* the effect of the disruptiveness of the Petitioner's behavior on the department had to be determined. In *Maples*, the Eleventh Circuit examined memoranda, testimony as to personal confrontations, factionism and infighting, the "Review" prepared by the Plaintiffs, and the American Board of an Engineering and Technology's conclusions to reach the conclusion that the efficient administration of the department outweighed the free speech interest, *Maples*, at 1548-50. In *Ayoub*, the Fifth Circuit reviewed testimony concerning Ayoub's twenty years of salary complaints, his disruptive behavior and his EEOC complaint. *Ayoub*, at 835-37.

The District Court and the Court of Appeals reviewed this evidence and both courts came to the determination that the jury's verdict did not support the evidence. *Ayoub*, at 836; Petition for Writ of Certiorari, Fifth Circuit Order at B-3. The Fifth Circuit went as far as to say "the jury totally disregarded the testimony in the case." Petition for Writ of Certiorari, Fifth Circuit Order at B-3.

To review this case on writ of certiorari would again entail a review of the factual evidence.

CONCLUSION

In summary, Petition for Writ of Certiorari should be denied. The Fifth Circuit properly based its opinion on well-established United States Supreme Court authority. There is no conflict among the courts on this issue and the granting of writ of certiorari would not add anything new to the body of First amendment case law. In addition, a review of this case would be fact intensive.

Respectfully submitted,

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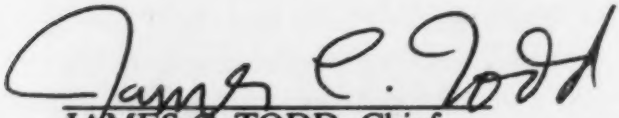

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested, on this the _____ day of _____, 1991, to:

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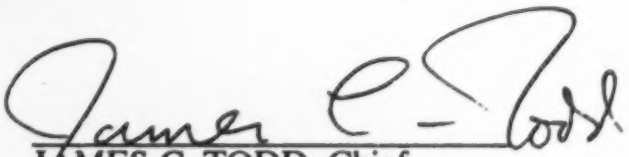

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